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9/17/2020 4:57 PM
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IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

THE ASSOCIATED PRESS, et al., Plaintiffs, v. THE TENNESSEE REGISTRY OF ELECTION FINANCE, et al., Defendants.	No. 20-0404-III

OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs The Associated Press and its reporter Kimberlee Kruesi, Chattanooga Publishing Company, Gannett GP Media, Inc. and its editor Michael Anastasi, Gould Enterprises, Inc., Meredith Corporation and its reporter Jeremy Finley, Memphis Fourth Estate, Inc., Scripps Media, Inc. and its reporter Ben Hall, TEGNA, Inc. and its news directors Jeremy Campbell and Lisa Lovell, the Tennessee Association of Broadcasters, the Tennessee Coalition for Open Government, Inc., and the Tennessee Press Association (collectively, "Plaintiffs") hereby file their opposition to the Motion for Summary Judgment (the "Motion") filed by Defendants the Tennessee Registry of Election Finance (the "Registry"), Registry members Paige Burcham-Dennis, Hank Fincher, David Goldin, Paz Haynes, Tom Lawless, and Tom Morton (the "Registry Members"), and Bill Young, the Executive Director of the Bureau of Ethics and Campaign Finance ("Director Young") (collectively, "Defendants"). For the reasons set forth below, Defendants' Motion should be denied.

LEGAL STANDARD

Summary judgment is appropriate only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. "[T]he court must view the evidence in the light most favorable to the nonmoving party and resolve any genuine issues of material fact in its favor." *Harris v. Haynes*, 445 S.W.3d 143, 146 (Tenn. 2014) (citing *Thompson v. Memphis City Schs. Bd. of Educ.*, 395 S.W.3d 616, 622 (Tenn. 2012)); *see also Meyers v. First Tenn. Bank*, 503 S.W.3d 365, 373 (Tenn. Ct. App. 2016) (citation omitted). "A motion for summary judgment must be denied 'if there is a dispute as to any material fact or any doubt as to the conclusion to be drawn from that fact[.]'" *Meyers*, 503 S.W.3d at 373 (citation omitted). "[A] moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis." *Rye v. Women's Care Ctr. of Memphis*, 477 S.W.3d 235, 264 (Tenn. 2015). Rather, in order to demonstrate entitlement to judgment as a matter of law, the moving party must "affirmatively negat[e] an essential element of the nonmoving party's claim, or . . . demonstrate[e] that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim." *Id.* (emphasis in original).

ARGUMENT

I. The OMA's Definition of "Meeting" Does Not Turn on Whether the Decision Made Is Legally Binding, But if It Did, the Registry Has the Power to Settle Civil Penalties It Levies.

Defendants assert that they lacked the authority to accept Representative Towns' proposed settlement offer and, as a result, the email vote could not have violated Tennessee's Open Meetings Act (the "OMA"). (Defs.' Mem. in Supp. of Mot. for Summ. J. at 5 (hereinafter, "Mem.").) But the distinction Defendants attempt to draw between binding and non-binding

decisions is one without a legal difference. The OMA does not distinguish between binding and non-binding decisions, and such a distinction would be inconsistent with the well-established rules of interpretation in OMA cases. In any event, Defendants' own actions and admissions, as well as Tennessee law, make clear that the Registry is, in fact, empowered to settle civil penalties it levies. Accordingly, Defendants cannot demonstrate that they are entitled to judgment as a matter of law.

A. The email vote was a "meeting" regardless of whether the Registry has the power to settle civil penalties it levies.

Defendants identify no authority to support their implicit assertion that the OMA applies only to votes with binding legal force—for the simple reason that no such authority exists. Contrary to the language of the OMA and rules for its interpretation, Defendants seek to distinguish between two types of decisions: binding votes and non-binding votes—with the former being covered by the OMA and the latter not. However, the language of the OMA's "meeting" definition draws no distinction between different types of decisions that make a convening of a governing body a "meeting." To the contrary, the OMA makes clear that a "meeting" occurs when a governing body makes a decision or deliberates toward a decision "on *any matter*." Tenn. Code § 8-44-102(b)(2) (emphasis added)).

Defendants' position also ignores the fact that non-binding votes of governing bodies are still public policy decisions and are the public's business. For example, governing bodies may vote on non-binding resolutions, such as the Metro Nashville Council's vote to approve "[a] resolution urging Governor Bill Lee and the Tennessee General Assembly to amend legislation which requires in part the declaration of 'Nathan Bedford Forrest Day' and to remove the bust of Nathan Bedford Forest from the Tennessee Capital." (Ex. 1 to Pls.' Reply in Supp. of Mot. for J. on Pleadings at 1, 6.) Under Defendants' proffered interpretation of the OMA, votes on such

non-binding resolutions and other votes without definitive legal effect could be conducted in secret. This is flatly inconsistent with both the language and spirit of the OMA.

The Court of Appeals has instructed that the definition of "meeting" under the OMA "should not be narrowed by literal parsing of its terms since [Section 8-44-102(c)][1] warns that 'chance meetings, informal assemblages, or electronic communication shall not be used to decide or deliberate public business in circumvention of the spirit or requirements [the OMA].'" *State ex rel. Akin v. Town of Kingston Springs*, No. 01-A-01-9209-CH00360, 1993 WL 339305, at *3 (Tenn. Ct. App. Sept. 8, 1993). More generally, the OMA should "be construed broadly to promote openness and accountability in government." *Metro. Air Research Testing Auth., Inc. v. Metro Gov't*, 842 S.W.2d 611, 616 (Tenn. Ct. App. 1992) (citations omitted); *see also State v. Shelby Cty. Bd. of Comm'rs*, 1990 WL 29276, at *5 (Tenn. Ct. App. Mar. 21, 1990) (citation omitted) (holding that the OMA "is to be construed so as to frustrate all evasive devices"). The Court should reject the Defendants' narrow, evasive interpretation of the OMA and find that the email vote was a meeting, regardless of whether the Registry has the power to accept or reject the proposed settlement.

B. The Registry has the power to settle civil penalties it levies.

1. The Registry's independence would be undermined if the Attorney General had the unilateral authority to settle civil penalties levied by the Registry.

To support their argument that only the Attorney General has the power to settle civil penalties levied by the Registry, Defendants cite to the Attorney General's "duty to oversee '[t]he trial and direction of all civil litigated matters and administrative proceedings in which the state or any officer, department, agency, board, commission or instrumentality of the state may

[1] The opinion cites to the predecessor statute, Tenn. Code § 8-44-102(d). The current version has been inserted in brackets for clarity.

be interested." (Mem. at 5 (citing Tenn. Code § 8-6-109(b)(1).) However, the Legislative intent behind the creation of the Registry was to vest it with the power to "ensure enforcement" of specific campaign and financial disclosure statutes. Tenn. Code § 2-10-202. The Attorney General has even opined that the statutes that created the Registry "reflect the intent of the General Assembly to create 'an independent entity of state government'" and "to entrust enforcement of campaign finance issues, a sensitive and potentially partisan topic, to a panel of members forbidden from participating in partisan politics during their membership." Tenn. Op. Att'y Gen. No. 98-122, 1998 WL 423972, at *4 (July 10, 1998); *see also id.* at *3 ("The duty to interpret and enforce this statute has been given to the Registry in legislation approved by the legislative and executive branches."). This independent role of the Registry would be undermined if the Attorney General possessed the sole authority to accept settlement offers for civil penalties levied by the Registry.

The Registry's enabling statutes vest it with specific authority to impose civil penalties for violation of the State's financial disclosure laws, and no provision transfers the power to settle such civil penalties to the Attorney General, or any other official or entity. Tenn. Code §§ 2-10-110(a), 2-10-207, 2-10-308(a). Though the Registry "has the authority to petition the chancery court through the attorney general and reporter for enforcement of any order it has issued," Tenn. Code § 2-10-209, this provision does not transfer the power to settle a civil penalty levied by the Registry to the Attorney General. Likewise, while the Attorney General has a specific duty to "[r]epresent the registry of election finance in any action or lawsuit in any

court of this state," Tenn. Code § 2-10-109(a)(3), this provision does not transfer the power to settle a civil penalty levied by the Registry to the Attorney General.[2]

Prior campaign finance disclosure laws reinforce this position. For example, under the Campaign Financial Disclosure Act of 1975, "the duty and authority to enforce" it was expressly "vested solely in the Attorney General of the State of Tennessee." *Dobbins v. Crowell*, 577 S.W.2d 190, 192 (Tenn. 1979) (citations omitted). As discussed above, that authority now statutorily resides with the Registry. To permit the Attorney General to unilaterally control the settlement of civil penalties levied by the Registry would conflict with the Registry's statutory powers of enforcement and the General Assembly's intent to make the Registry an independent entity.

2. The Registry's actions belie their argument.

Defendants' argument that it is the Attorney General who has the sole authority to settle civil penalties levied by the Registry is also at odds with Defendants' actions in this case and in past cases. Director Young's email indicates that he thought the Registry had to approve the settlement proposal before Representative Towns could be eligible for the ballot. Director Young explained in his April 2, 2020 email that "[t]he Registry Board has now voted via email 4-2 to accept Representative Towns' counsel's settlement proposal." (Compl. Ex. 2 at 2.). Director Young's email also reflects his understanding that, because the Registry voted to accept the settlement offer, "this matter is now resolved, meaning that Joe Towns is no longer disqualified from running for re-election to his Tennessee House seat." (*Id.*)

[2] In private practice it would be an ethical violation for an attorney representing a client to unilaterally settle a case. Tennessee Rule of Professional Conduct 1.2(a) provides that "[a] lawyer shall abide by a client's decision whether to settle a matter." The comments to Rule 1.2 further explain that "The decisions specified in paragraph (a), such as whether to settle a civil matter, also must be made by the client."

This understanding of Director Young's email is consistent with what he told Deborah Fisher, Executive Director of Plaintiff the Tennessee Coalition for Open Government, on a call on April 7, 2020.[3] (Ex. 1 ¶ 2.) On that call, Director Young expressed to Ms. Fisher that it was his understanding that the Registry was required to vote on the settlement offer from Representative Towns in order for Representative Towns to be eligible to be on the ballot in August 2020. (*Id.*) The filing deadline for the August 2020 ballot was April 2, 2020 and the vote took place on April 1, 2020. (*Id.*) Director Young told Ms. Fisher that there was not sufficient time for him to publicly notice a public meeting ahead of the looming filing deadline, so he instead called and emailed the Registry Members asking for their votes on whether to approve the settlement offer from Representative Towns. (*Id.*)

The Registry's July 8, 2020 meeting shed further light on the events of April 1, 2020, related to the settlement with Representative Towns. At the July meeting, the Registry discussed a threat by Representative Towns to challenge the constitutionality of Tennessee's campaign finance laws if they did not accept his settlement offer. (*Id.* ¶ 6.) This too reinforces the conclusion that the Registry, not the Attorney General, has the power to settle civil penalties the Registry levies.

Even the language used by Director Young and Mr. Himes in their Declarations filed in support of Defendants' Motion supports the conclusion that the Registry's vote was not merely a recommendation, but instead was a decision whether to approve or accept the settlement proposal from Representative Towns. Neither of them uses "recommend" as the Defendants did in their Answer; instead, they both refer to the actions of the Registry at the cure meeting as

[3] Given Defendants' position in this case that the vote did not carry legal weight or was otherwise not binding, Director Young's statements to Ms. Fisher are admissible under the Admission by Party-Opponent exception to the hearsay rule. Tenn. R. Evid. § 803(1.2).

either approving or accepting the offer from Representative Towns. (Himes Decl. ¶ 5 ("Several members expressed their *approval*, while others voiced their opinions that the offer should not be *accepted*." (emphasis added)); *id.* ¶ 6 ("After substantial and substantive discussions, Registry member Paz Haynes made a motion to *approve* the settlement offer. The Registry's members then voted—four in favor of *approving* the settlement and two opposed." (emphasis added)); Young Decl. ¶ 5 ("Several members expressed their *approval*, while others voiced their opinions that the offer should not be *accepted*." (emphasis added)); *id.* ¶ 6 ("After substantial and substantive discussions, Registry members Paz Haynes made a motion, seconded by Member Goldin, to reconsider and confirm the *acceptance* of the settlement agreement proposed by counsel for Representative Towns." (emphasis added)).)

Finally, the minutes for the Registry's June 2017 meeting further support the conclusion that the Registry's decisions regarding offers to settle civil penalties it has levied carry legal force. After voting to accept "two requests for civil penalty agreements from the Attorney General's Office" that reduced penalties by 50%, the Registry unanimously enacted a policy that "any civil penalty request from the Attorney General's Office that reduces a civil penalty more than 50% should be brought before the board for a decision. (Civil penalty requests that reduce less than 50% should be handled by the Executive Director.)" (Ex. 3 to Pls.' Reply in Supp. of Mot. for J. on Pleadings at 18.) In this case, according to an email sent by Director Young, Representative Towns owed the Registry $65,000 for civil penalties levied by the Registry and settled those outstanding civil penalties for $20,900, less than 50% of the total owed. (Compl. Ex. 2 at 2.)

To accept Defendants' argument would allow for the absurd possibility that the Attorney General could independently accept a settlement offer of any amount—no matter how small or

large—for civil penalties levied by the Registry. Such an abdication of authority would not only threaten the Registry's independence, but also it would contradict Defendants' own demonstrated understanding of the Registry's own authority in voting to accept settlement offers. Accordingly, even assuming *arguendo* that it is material whether the Registry has the power to settle civil penalties it has levied—which it is not—the Registry wields that power.

II. Even if the Email Vote Was Not a "Meeting" Under the OMA, the Email Vote Was Still a Violation of the OMA.

Even if the Court finds that the email vote was not a meeting under the OMA, that finding would not dispose of this case. Plaintiffs have also alleged that Defendants violated the OMA because the email vote was not public, as is required by Tenn. Code § 8-44-104(b), and because Defendants' email vote violated the OMA's prohibition on the use of electronic communication and informal assemblages "to decide or deliberate public business in circumvention of the spirit or requirements" of the OMA, Tenn. Code § 8-44-102(c). (Compl. ¶¶ 46, 48.) Defendants make no mention of these provisions and the related allegations in the Complaint in their Motion or supporting Memorandum of Law. In fact, the Registry has refused a public records request by Ms. Fisher for the email votes themselves and that request was denied based on an allegation that those email votes are covered by the attorney-client privilege. (Ex. 1 ¶ 4.) In other words, the Registry does not even consider the email votes public records subject to disclosure. Accordingly, even if the Court agrees with Defendants that the email vote was not a "meeting" as defined by the OMA, Defendants have not shown that Plaintiffs' evidence is "insufficient to establish [their] claim," and summary judgment should not be granted as to all of Plaintiffs' OMA claims.

III. The July Meeting Did Not Moot Plaintiffs' Claim.

"An issue becomes moot if an event occurring after the commencement of the case extinguishes the legal controversy attached to the issues, or otherwise prevents the prevailing party from receiving meaningful relief in the event of a favorable judgment." *Scripps Media, Inc. v. Tenn. Dep't of Mental Health & Substance Abuse Servs.*, No. M2018-02011-COA-R3-CV, 2019 WL 3854298, at *4 (Tenn. Ct. App. Aug. 16, 2019) (citations omitted). Here, there is a live legal controversy: whether the Defendants' email vote violated the OMA. And nothing prevents the Plaintiffs from receiving the relief they seek: a permanent injunction against Defendants and court supervision, as prescribed in Tenn. Code § 8-44-106(c)–(d). Defendants argue that this case is moot because the Registry held a cure meeting. (Mem. at 6–7.) But where, as here, a plaintiff seeks injunctive relief and court supervision, rather than nullification of a governing body's action, a cure meeting—even an effective one—does not moot a case.

Defendants rely primarily upon the Court of Appeals' decision in *Neese v. Paris Special School District*, 813 S.W.2d 432 (Tenn. Ct. App. 1990), to support their mootness argument, but *Neese's* cure holding is not as broad as Defendants argue. Defendants selectively quote from *Neese* to argue that "[t]he Act is not intended . . . 'to bar a governing body from properly ratifying its decision made in a prior violative manner.'" (Mem. at 6 (quoting *Neese*, 813 S.W.2d at 436).) But this quotation is divorced from its context:

> T.C.A. § 8-44-105 provides that "[a]ny action taken at a meeting in violation of this part shall be void and of no effect . . . ." We do not believe that the legislative intent of *this statute* was forever to bar a governing body from properly ratifying its decision made in a prior violative manner.

Neese, 813 S.W.2d at 436 (emphasis added); *see also Akin*, 1993 WL 339305, at *4 (explaining that the purpose of the cure doctrine is to prevent "mistakes by public officials" from "forever

frustrat[ing] the conduct of public business") (citations omitted). In other words, a proper cure meeting simply permits a governing body to avoid the nullification remedy in Tenn. Code 8-44-105.

Neese does not address at all how a remedial action, like a cure meeting, impacts the remedies the General Assembly provided for in Tenn. Code § 8-44-106, which are the only remedies sought in this case. The Court of Appeals' decision in *Zseltvay v. Metropolitan Government of Nashville*, 986 S.W.2d 581 (Tenn. Ct. App. 1998), does, however, address how the OMA's two remedies provisions should be applied when a governing body has taken a remedial action. In that case, the governing body in question "performed a valid and necessary remedial action," and, as a result, the court found no reason to void the action. *Id.* at 585. Nevertheless, the court did not find the case to be moot and ordered the same injunctive relief and court supervision sought by Plaintiffs here. *Id.* In doing so, the court noted that "[t]he Legislature obviously felt that the use of injunction and the application of judicial oversight to the activities of a governmental body in violation of the Act was the best guarantee of subsequent compliance." *Id.*

"[S]trict compliance with the Act is a necessity if it is to be effective . . . ." *Id.* A cure meeting, even an effective one, is not, as Defendants' contend, a "get-out-of-jail-free" card for any governing body that has run afoul of the OMA; were that the case, it would render the relief provisions of Tenn. Code § 8-44-106 meaningless. Governing bodies could violate the OMA with impunity and simply hold a cure meeting to end any suit brought to enforce the OMA. Such an absurd result would encourage circumvention of the OMA. *Shelby Cty. Bd. of Comm'rs*, 1990 WL 29276, at *5 ("It is our responsibility to construe all legislation as it is written, and unless it violates our state constitution or our federal constitution, do so in a manner

to prevent its circumvention."). And it would make the OMA a useless statute with no real enforcement mechanism—a result which would be contrary to Tennessee law. *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010) (citations omitted) ("The courts may . . . presume that the General Assembly did not intend to enact a useless statute and that the General Assembly 'did not intend an absurdity.'"). Cure does not moot a case where, as here, relief is sought pursuant to Tenn. Code 8-44-106. Defendants' argument to the contrary should be rejected.

CONCLUSION

Defendants seek to avoid responsibility for their email vote by asserting incorrect legal arguments divorced from the language and spirit of the OMA, and by taking a subsequent remedial action in an effort to moot the case. But both of Defendants' arguments are unavailing, especially when considered in light of the clear requirement that the OMA be broadly construed in favor of public access. Therefore, Plaintiffs respectfully request that the Court deny Defendants' Motion.

Dated: September 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September 2020, a copy of the foregoing filing was filed electronically and has been served on all counsel of record via the Court's E-Filing Service and/or by email, as agreed to by counsel for Defendants.

/s/ Paul R. McAdoo